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No. 94-1722

In the Supreme Court of the United States

OCTOBER TERM, 1995

JULIA SAAVEDRA BALMACEDA, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' claims for damages resulting from a decision by the Commissioner of the Food and Drug Administration to take measures to protect the domestic food supply in light of information suggesting that fruit imported from Chile had been injected with cyanide.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-24a) is reported at 46 F.3d 279. The opinion of the court of appeals panel (Pet. App. 28a-49a) is unreported. The memorandum and order of the district court dismissing the case (Pet. App. 50a-57a) is reported at 815 F. Supp. 823.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-27a) was entered on January 25, 1995. The petition for a writ of certiorari was filed on April 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 2 and 7, 1989, the United States Embassy in Chile received anonymous telephone calls stating that Chilean fruit bound for the United States had been or would be injected with cyanide. In response to those calls, the Food and Drug Administration (FDA) increased inspections of fruit imported from Chile. On March 11, 1989, the FDA found three suspicious-looking grapes in a crate of grapes from Chile. Two of the grapes had puncture marks surrounded by white rings; the third had a slit surrounded by white rings. The FDA sent the grapes to an FDA laboratory in Philadelphia, Pennsylvania, for testing. Pet. App. 5a-6a.

Technicians at the Philadelphia lab macerated the two punctured grapes and found that the resulting slurry tested positive for cyanide. The technicians reported that finding to FDA officials in Washington and sent the slurry, as well as the intact (slit) grape, to an FDA lab in Cincinnati, Ohio, for further testing. The Cincinnati lab was unable to confirm the presence of cyanide in either the slurry or the intact grape. The Commissioner of the FDA nonetheless decided to take protective measures. On March 13, 1989, he temporarily banned the importation of Chilean fruit; he urged the withdrawal from the domestic market of Chilean fruit that had already been imported; and he notified the public of those actions and of the evidence of cyanide tampering. The ban on importation was lifted on March 17, 1989, after no further evidence of tampering was found. Pet. App. 6a-7a.

2. Petitioners are growers, shippers, exporters, and importers of Chilean fruit. See Pet. App. 7a.

They brought six actions, later consolidated, in the United States District Court for the Eastern District of Pennsylvania, seeking damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. They alleged that, in testing the grapes, the FDA lab technicians in Philadelphia had departed in certain respects from the FDA's Regulatory Procedures Manual and from accepted laboratory procedures. See, *e.g.*, C.A. App. 173-174. They further alleged that, "[a]s a direct and proximate result of FDA's negligent laboratory analysis," they suffered more than $210 million in damages. *E.g.*, *id.* at 161. The government moved to dismiss the actions on the ground that they were barred by the discretionary function exception to the FTCA.[1] The district court granted the motion,

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[1] The FTCA generally waives the sovereign immunity of the United States from claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b). That waiver is subject to certain exceptions. The exception relevant here, the discretionary function exception, 28 U.S.C. 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a

holding that "the FDA is protected by the discretionary function exception." Pet. App. 56a.

3. A divided panel of the court of appeals reversed the order of dismissal and remanded the case for further proceedings. Pet. App. 28a-49a. The en banc court of appeals vacated the panel's decision, however, and by a 7-6 vote affirmed the dismissal of the case. *Id.* at 1a-24a.

The en banc court began by setting out the "two-pronged inquiry" for determining "[w]hether the discretionary function exception applies" (Pet. App. 9a):

> "[A] court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz* [v. *United States*, 486 U.S. 531, 536 (1988)]. Second, the court must determine whether the element of judgment involved "is of the kind that the discretionary function exception was designed to shield." [*Ibid.*] Under this second prong, the court must determine whether the challenged discretionary actions or decisions were "based on considerations of public policy." *Id.* at 537. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

The court determined that the decision of the FDA Commissioner to take protective measures with regard to Chilean fruit was within his discretion and

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discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

involved the type of discretion that the discretionary function exception was designed to protect. *Id.* at 10a-11a. The court rejected petitioners' argument that, for purposes of determining whether the exception applied, their claims were not "based upon" (28 U.S.C. 2680(a)) the Commissioner's decision but instead upon the actions of the FDA lab technicians who tested the grapes. Pet. App. 11a-13a.

The dissenting judges believed that dismissal was improper because "the actions of the laboratory technicians, in testing the grapes, * * * are not protected by the [discretionary function] exception." Pet. App. 19a. In the dissent's view, the Commissioner's later decision to take protective steps was irrelevant to the application of the exception. *Id.* at 21a-22a. The dissent recognized, however, that petitioners "may encounter difficulty in attempting to prove that the alleged negligence of the lab technicians, rather than the Commissioner's decision, was the proximate cause of their injuries." *Id.* at 22a n.1.

ARGUMENT

1. The discretionary function exception to the FTCA preserves the sovereign immunity of the United States from tort claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. 2680(a). The court of appeals held that the exception barred petitioners' claims because, for purposes of Section 2680(a), those claims were "based upon" the FDA Commissioner's decision, in light of information suggesting possible cyanide tampering, to take protective measures with respect

to Chilean fruit, and because that decision involved an exercise of the type of discretion that the exception was designed to protect. Pet. App. 4a, 9a-14a.

Petitioners do not dispute that the Commissioner's decision falls squarely within the discretionary function exception. Instead, they contend (Pet. 12) that their claims are not "based upon" his decision, but upon the FDA's allegedly negligent testing of the three suspicious-looking Chilean grapes. They argue that they have avoided the discretionary function's bar to a challenge to the Commissioner's decision by "plead[ing], properly under Pennsylvania law (the state in which the testing occurred), that non-discretionary laboratory negligence caused their losses." Pet. 13. Thus, according to petitioners, the court of appeals erred by "fail[ing] to accept the allegations of causation contained in the complaints and * * * fail[ing] to apply Pennsylvania's law of negligence." Pet. 11; see also Pet. 13-14.

The court of appeals correctly determined (see Pet. App. 12a) that federal law, not state law, governs the question in this case of what government conduct petitioners' claims are "based upon." That question arises because a federal statute, 28 U.S.C. 2680(a), bars tort claims "based upon" the performance of a discretionary function. Cf. *Kosak* v. *United States*, 465 U.S. 848, 851-862 (1984) (federal law governs question whether plaintiff's claim "ar[ose] in respect of * * * the detention of any goods or merchandise by any officer of customs" for purposes of 28 U.S.C. 2680(c)); *Bramer* v. *United States*, 595 F.2d 1141, 1144 & n.7 (9th Cir. 1979).

Nor did the court of appeals "fashion[] a federal common law standard," as petitioners assert. Pet. 13; see also Pet. 22. The court based its decision

squarely on the text of the federal statute. That is clear from the court's repeated references to the operative statutory phrase "based upon." See, *e.g.*, Pet. App. 4a, 8a, 12a, 13a. Neither did the court "deviat[e]" (Pet. 22) from decisions of this Court by interpreting the discretionary function exception in light of its purposes. This Court has made clear that those purposes are relevant to a "proper[] construc[tion]" of the exception. *Berkovitz* v. *United States*, 486 U.S. 531, 537 (1988); see also *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984) (reviewing legislative history "for a proper understanding of the application of the discretionary function exception to this case"); *Dalehite* v. *United States*, 346 U.S. 15, 32-34 (1953).

Petitioners err in arguing that their claims cannot be barred by federal law because they "pleaded all of the requirements of causation under Pennsylvania's law of negligence." Pet. 21; see also Pet. 13-14. Petitioners confuse the issue whether they made out the elements of a tort claim under Pennsylvania law with the quite different issue whether such a claim was barred as a matter of federal law by the discretionary function exception to the FTCA. When the discretionary function exception applies, the government's sovereign immunity is preserved and state rules of substantive liability do not come into play. See *Bramer*, 595 F.2d at 1144 n.7 ("State tort law 'applies' to the federal government only to the extent that there has been a 'clear relinquishment of sovereign immunity.'") (quoting *Dalehite*, 346 U.S. at 31).

Petitioners also err in arguing (Pet. 21-22) that they foreclosed the application of the discretionary function exception by pleading that their damages

were caused by negligent lab testing (rather than the Commissioner's decision). This Court has consistently rejected the notion that plaintiffs may avoid the bar of sovereign immunity by artful pleading. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949). The Court has rejected an argument that 28 U.S.C. 2680(h), which excludes from the FTCA tort suits "arising out of" negligent misrepresentation, "does not apply * * * when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation.'" *United States* v. *Neustadt*, 366 U.S. 696, 703 (1961). Here, the court of appeals correctly rejected petitioners' argument that they could avoid the discretionary function exception's bar to a challenge to the Commissioner's discretionary decision merely by alleging that their claims were based, not on that discretionary decision, but on antecedent, nondiscretionary government conduct.[2]

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[2] For similar reasons, petitioners err in asserting that "this Court now needs to establish a standard for reviewing the sufficiency of a complaint's allegations as to the governmental conduct, preceding a loss, that may properly be pleaded as the legal and proximate cause of the harm." Pet. 13. The discretionary function exception imposes a substantive limit on the FTCA's waiver of sovereign immunity, not merely a pleading requirement. The applicability of the exception is not controlled by what conduct a plaintiff alleges as the "legal and proximate" cause of the damages.

Petitioners observe (Pet. 20) that, in ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept the factual allegations in the complaint as true. See, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315, 327 (1991). The courts below adhered to that principle. Pet. App. 5a, 50a. As the court of appeals recognized, however, that principle did not require it to accept petitioners' *legal* contention that, on the facts alleged

Finally, the court of appeals correctly applied the statutory standard in holding that petitioners' claims were "based upon" the Commissioner's discretionary decision to take protective measures in regard to Chilean fruit. The FTCA exception applies to suits "based upon the exercise or performance * * * [of] a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. 2680(a). Application of the exception thus does not require that a suit be based *exclusively* upon exercise of a discretionary function. Petitioners' suit was necessarily based at least in part upon the Commissioner's decision to adopt protective measures in regard to Chilean fruit, even though it also was based in part on allegedly negligent lab testing. The alleged negligence of the Philadelphia lab testing itself resulted in no harm to petitioners. It was the discretionary action that the Commissioner took in light of that testing (and the other information before him) that caused the harm and that was therefore a necessary element of petitioners' claim. Pet. App. 22a. In deciding whether to act and what action to take, the Commissioner had broad discretion in responding to the conflicting test results received from Philadelphia and Cincinnati, the anonymous phone calls, and the other information in his possession. The positive finding of the Philadelphia lab in no way compelled him to make the decision that he made. The Commissioner could have ordered more testing or other measures that could have resulted in

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in their complaints, their claims were "based upon" the FDA's allegedly negligent laboratory testing rather than the FDA Commissioner's subsequent decision to take protective measures with regard to Chilean fruit. See Pet. App. 12a-13a.

either no damages to petitioners or damages quite different from those alleged.[3] The discretionary function exception applies under such circumstances. If it did not, a discretionary governmental decision allegedly resulting in harm would be subjected to FTCA liability, which is the very result the discretionary function exception was designed to prevent.

2. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Petitioners recognize (Pet. 13, 18) that no decision of this Court is on point. They cite only two court of appeals decisions concerning the question of what government conduct a plaintiff's claim is "based upon" for purposes of Section 2680(a). See Pet. 14-17 (citing *Patterson* v. *United States*, 856 F.2d 670 (1988), vacated, 866 F.2d 1538, on reh'g, 881 F.2d 127 (4th Cir. 1989) (en banc), and *Appley Bros.* v. *United States*, 7 F.3d 720 (8th Cir. 1993)). Neither of those decisions conflicts with the decision below.

In *Patterson*, the plaintiffs claimed that a mine inspector from the federal Office of Surface Mining (OSM) negligently reported on the conditions at a mine, and that his negligence caused OSM to decide not to use emergency funds to ameliorate conditions at the mine. 856 F.2d at 671. The plaintiffs purported

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[3] Petitioners argue that "there is no record whatsoever as to the conduct of the FDA Commissioner" from which the court of appeals could assess its discretionary nature. Pet. 20. The court, however, properly accepted as true the allegations in petitioners' complaint describing the Commissioner's decision, Pet. App. 5a, and determined, in light of the statutes and regulations governing the Commissioner's authority under the circumstances alleged, that his decision was "susceptible to policy analysis," *id.* at 9a (quoting *Gaubert*, 499 U.S. at 325); see also *id.* at 10a n.1 (citing relevant statutes and regulations).

to challenge only the inspector's conduct, and not OSM's subsequent discretionary decision not to spend emergency funds. *Id.* at 673. A Fourth Circuit panel held that the discretionary function exception did not bar the action, because the inspector had violated nondiscretionary federal guidelines. *Id.* at 673-674. The en banc court vacated the panel's decision, however, holding that the exception did bar the action, in light of the discretionary nature of OSM's decision not to spend emergency funds. 881 F.2d at 128.

Patterson is thus analogous to and fully consistent with the present case. There, as here, the plaintiffs' claim was based on the effects of a discretionary decision that was, in turn, caused by a nondiscretionary decision that was alleged to be negligent. Since the discretionary decision was the immediate cause of harm to the plaintiffs, the discretionary function exception was applicable.

In *Appley*, a grain warehouse was operating with inventory shortages. 7 F.3d at 721. Department of Agriculture inspectors noted those shortages during an inspection, directed their elimination, and later conducted a special inspection to check compliance with the ordered elimination of the shortages. *Id.* at 721-722. Although the shortages continued, they were negligently not noted by the inspectors. *Id.* at 722. As a result, plaintiff farmers and others continued to deposit grain with the warehouse. *Ibid.* The warehouse's federal license to operate was ultimately revoked, but plaintiffs claimed that the Department of Agriculture would have revoked the license sooner, causing plaintiffs to lose less money, but for the negligence of federal warehouse inspectors. *Ibid.* The Eighth Circuit held that the

claim was not barred by the discretionary function exception. *Id.* at 725-727. The court concluded that "[t]he causative fact in [the plaintiffs'] claims is the inspectors' failure to follow the mandatory requirements of the handbook, not the Secretary's failure to revoke [the warehouse's] license." *Id* at 725-726. This was true because the inspectors' failure to determine whether inventory shortages continued to exist "prevented the Secretary from exercising discretion to decide whether to revoke [the warehouse's] license." *Id.* at 725-726.

Appley is consistent with the decision below. The claim in *Appley* was based entirely on nondiscretionary, negligent behavior that precluded a discretionary decision that would have prevented harm from taking place. In contrast to *Patterson* and the present case, plaintiffs' claim in *Appley* was not based upon harm caused by a discretionary decision.[4]

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[4] Petitioners err in contending that the decision below "departed from * * * caselaw establishing that the discretionary function exception does not apply to the technical, scientific or mechanical undertakings by federal employees." Pet. 23. Rather, the court of appeals simply held that petitioners' claims were not "based upon" such an "undertaking[]."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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